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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

STATE OF NEVADA, Plaintiff, vs. UNITED STATES; UNITED STATES DEPARTMENT OF ENERGY; RICK PERRY, in his official capacity as Secretary of Energy; NATIONAL NUCLEAR SECURITY ADMINISTRATION; and LISA E. GORDON, in her official capacity as Administrator of the National Nuclear Security Administration and Undersecretary for Nuclear Security, Defendants.	)	Case No. 3:18-cv-569-MMD-CBC **MOTION TO EXCLUDE WITNESSES AND LIMIT TESTIMONY**

INTRODUCTION

The United States of America, on behalf of all Defendants, hereby moves to exclude the following testimony at the hearing on Plaintiffs' Motion for Preliminary Injunction (ECF No. 2) scheduled for January 17, 2018:

1. Any testimony by Bradley Crowell, Greg Lovato, John Bakkedahl, or an unnamed "officer from the Governor's Office of Economic Development," should be excluded based on Plaintiff's failure to provide any notice of the subject of their testimony. *See* Plaintiff's List of Exhibits and Witnesses (ECF No. 35) at 3-4.

2. Any testimony by Robert J. Halstead or any other witness concerning the adequacy of the NEPA analysis done in this case should be excluded because (a) it necessarily constitutes impermissible legal opinion and (b) it is necessarily outside the administrative record for this case.

ARGUMENT

1. <u>Testimony by all witnesses who have not previously submitted an affidavit or a declaration should be excluded.</u>

Plaintiff has had ample opportunity to present declarations or affidavits in support of its Motion. It included three affidavits, that of Robert J. Halstead (ECF No. 1-3), Timothy A. Frazier (ECF No. 1-2), and Pam Robinson (ECF No. 4), in support of its Complaint and its Motion for Preliminary Injunction. It then filed its Reply Brief in Support of Motion For Preliminary Injunction ("Reply Brief") after the parties had filed their Joint Status Report providing witness and exhibit lists (ECF No. 29). It included no supporting declarations with its Reply Brief (ECF No. 34), other than a declaration filed by a witness for the United States in a previous case who is not a listed witness for this hearing. If additional witness testimony exists to support Plaintiff's Motion or its Reply, Plaintiff should have included declarations describing that testimony. Plaintiff chose not to, and now attempts to present testimony of these witnesses without any disclosure prior to the hearing of the basis of their testimony.

Rule 65(a) provides that a preliminary injunction may only issue upon "notice to the adverse party." Fed. R. Civ. P 65(a). The "underlying principle of giving the party opposing

[the motion] an adequate opportunity to respond is carefully honored by the courts." 11A Fed. Prac. & Proc. Civ. § 2949 (3d ed.). The notice requirement in Rule 65 "implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 434 n. 7 (1974) (internal citations omitted).

Although the timing requirements of serving affidavits in support of or opposition to the motion "are applied flexibly in practice," a party must have sufficient notice to effectively respond to any affidavits. *See 11A Fed. Prac. & Proc. Civ. § 2949 (3d ed.)* (cited favorably in *Four Seasons Hotels And Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003)). At least one appellate court has reversed a grant of a preliminary injunction where affidavits in support of the motion, provided only on the day of the preliminary injunction hearing, were not served sufficiently in advance to allow defendants "adequate opportunity to prepare and present a factual showing controverting that of the plaintiffs." *Marshall Durbin Farms, Inc. v. Nat'l Farmers Org., Inc.*, 446 F.2d 353, 358 (5th Cir. 1971).

Here, Plaintiff attempts to present witness testimony without any advance notice of the parameters of the witnesses' testimony prior to the hearing. This is no different than the facts at issue in *Marshall Durbin Farms*, except Plaintiff attempts to convey factual information by testimony instead of affidavit. That difference in no way resolves the underlying notice issue. Because Plaintiff failed to serve affidavits or declarations describing these witnesses' potential testimony, their testimony should be excluded by the Court.

2. <u>Any testimony by Robert J. Halstead or any other witness that constitutes legal opinion as to the adequacy of the NEPA analysis done in this case should be excluded.</u>

As mentioned above, Plaintiff filed and served the Affidavit of Robert J. Halstead with its Complaint and Motion. Substantial portions of this Affidavit should not be considered by the Court because it is nothing more than legal analysis, and testimony to the same effect should be excluded.

Paragraphs 9 through 14, 16, 18 through 26 are little more than an explanation of the Affiant's opinion that the Supplemental Analysis at issue in this case "is deficient." *See* Halstead

Aff. ¶ 26 (ECF No. 1-3). It has long been held that resolving legal questions is "the distinct and exclusive province of the trial judge." *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (citation omitted). Testimony by attorneys, law professors, and others concerning what the law is and how it should be applied to the facts of a case has long been held improper and may constitute reversible error. *See id.*; *United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999); *United States v. Sullivan*, 74 F.2d 799, 800 (9th Cir. 1935). Where a witness offers a discussion and an application of the law, or provides legal explanations or conclusions, it is inadmissible. *Nationwide*, 523 F.3d at 1058-59.

3. <u>Any testimony by Robert J. Halstead or any other witness concerning the adequacy of the NEPA analysis done in this case should be excluded because it is necessarily outside the administrative record for this case.</u>

The Complaint in this case raises only one issue – whether the NEPA analysis completed by the Department of Energy is adequate. *See* Compl. ¶¶ 24-41. Such a claim can only be brought under the Administrative Procedure Act ("APA"). *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990) (judicial review of agency action proceeds under APA where the statute at issue does not provide cause of action); *Wetlands Action Network v. U.S. Army Corps of Engr's*, 222 F.3d 1105, 1114 (9th Cir. 2000) (same), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

Judicial review under the APA is limited to the administrative record and evidence outside the record is generally inadmissible. *See e.g.*, 5 U.S.C. § 706 (limiting review to the administrative record); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (same). Although certain exceptions to APA record review exist, Plaintiff concedes that they are not applicable here. Reply Brief at 4 (listing record review exceptions and arguing that this case must be decided on the basis of the NEPA analysis before the court "without additional justification in briefs or other materials").

This Court has recognized that evidence outside the administrative record generally should not be considered at any stage of an APA case, including when considering a motion for preliminary injunction. *Western Exploration LLC v. U.S. Dept. of the Interior*, 2015 WL 7195156 (D. Nev. 2015) at *2. Although such evidence is admissible if it meets the "narrow

exceptions" to the record-review rule, it cannot be used to testify about the correctness or wisdom of the decision at issue. *Id.* (*citing San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014)).

The United States agrees that extra-record evidence concerning the remaining requirements for issuance of a preliminary injunction – irreparable injury, balance of the equities, and the public interest – is appropriate. Extra-record evidence should not be permitted or considered on the issue of whether the NEPA analysis done in this case is legally sufficient, since that issue is limited to APA record review. Any testimony, therefore, concerning the adequacy of the NEPA analysis at issue should be excluded.

CONCLUSION

For the reasons explained above, the Court should exclude: 1) the testimony of any witness for which Plaintiff has failed to file an affidavit or declaration; and 2) any testimony bearing on the adequacy of the NEPA analysis done in this case because such testimony constitutes legal opinion and because it is necessarily outside of the administrative record.

Respectfully submitted, January 15, 2019.

/s/ David L. Negri
David L. Negri
United States Department of Justice

Counsel for the United States of America and all Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on January 15, 2019, a copy of the foregoing document was electronically filed with the Clerk of the Court and served using the CM/ECF system upon the following parties/attorneys of record:

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